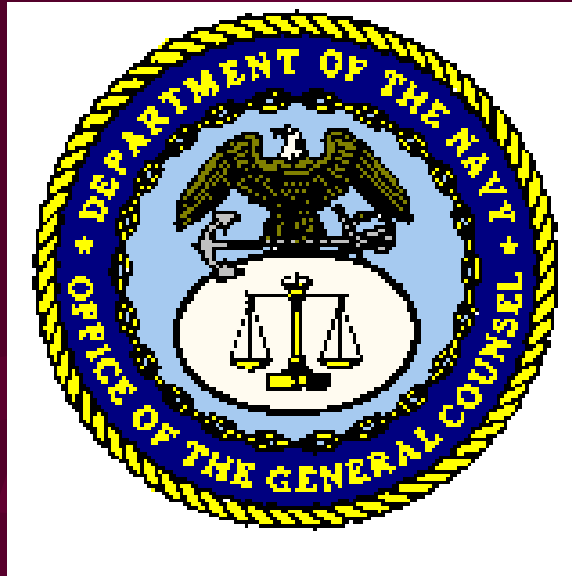




OFFICE OF THE GENERAL
COUNSEL
DEPARTMENT OF THE NAVY

EMPLOYEE PARTICIPATION IN A-76 STUDIES AND ETHICS ISSUES

This presentation informs Department of the Navy (DON) civilian employees of the ethics issues surrounding their participation in OMB Circular A-76 studies of DON commercial activities.

A-76 BACKGROUND:

The U.S. Navy is operating in an environment of reduced budgets while being required to maintain high levels of readiness. One method to meet this challenge is to conduct a cost comparison of performing commercial activities by in-house organizations to the cost of performing these functions by the private

A-76

BACKGROUND: (cont'd)

The Office of Management and Budget (OMB) Circular "Performance of Commercial Activities" and related guidance provide guidance and policy for conducting these comparisons. If a commercial activity is "studied" for competitive sourcing, the government must prepare a statement of work for the competition, and also prepare an in-house bid for the competition.

In some cases, you may be asked to provide information or participate in the A-76 competitive sourcing study.

A-76

BACKGROUND: (cont'd)

If the A-76 process results in a decision to have a contractor perform an employee's position, function, or job, the employee has a right of first refusal of employment with the contractor.

Various ethics laws place restrictions on those rights in certain cases.

A-76

BACKGROUND: (cont'd)

Historically, only about half of studies of DON commercial activities result in the Government continuing to perform the function.

If a contractor will perform the function, ethics restrictions may prevent an employee from performing it for a contractor or taking certain actions for a contractor.

Although there may be unique situations that prevent you from obtaining post-government employment after an A-76 study, simply doing what management asks/directs during the A-76 process will usually not disqualify you from working for a particular company.

The following provides guidance in this regard.

POLICY:

Generally, if management simply asks you to provide information to members of A-76 study teams, it will not subsequently restrict your post-Government employment opportunities with the contractor selected to perform the job.

Management tries to select Government employees for participation on a study team so that they will not be affected by the ultimate A-76 outcome.

POLICY: (cont'd)

If you believe you would like the opportunity to work with the contractor who might be selected to perform this job, let your supervisor know as soon as possible. It is likely that management will not require you to participate on a study team in a manner that would prevent you from exercising the rights described

RIGHTS:

If your position is converted to contract performance as a result of an A-76 study, you will have the **right of first refusal.**

This means the contractor will give Government employees who have been adversely affected or separated as a result of award of the contract the right of first refusal for employment openings under the awarded contract. However, the employee must be qualified for the job. This does not guarantee of a job offer. As explained below, your employment with the contractor must be consistent with criminal statutes and federal regulations.

DISCUSSION:

The first thing you need to understand is that the code of interest restrictions contained in Title 18 of the United States Code (U.S.C.), The procurement integrity provisions of 41 U.S.C. section 423, and Title 5 of the Code of Federal Regulations section 2635.601 may apply to your A-76 activities. Employees involved in A-76 commercial activity studies must comply with the requirements of these laws.

The types of tasks you may be asked to perform as the A-76 process may affect your ability to subsequently

- 1. seek and negotiate for post-government employment,**
- 2. work for/accept compensation from a particular company, or**
- 3. restrict your activities while working for a particular company.**

While the following Qs and As are intended to cover situations, you should bring any questions you have to your supervisor or to your Ethics Counselor. Specific facts and circumstances may affect your situation, so bear in mind the adage: "Better Safe Than Sorry"

MOST EFFICIENT ORGANIZATION:

To compare the performance of a function by the Government or a contractor, DON must develop its **most efficient organization ("MEO")** to perform that function. You may be asked to provide information to others, analyze the information to determine the MEO for the function.

The information you provide may consist of input to management studies or in-house cost estimates, such as keeping track of how much time is spent on a particular

MEO Question 1

If you are the employee providing this information to the employer:

Will this affect your ability to search for post-government employment?

MEO Answer 1

ANSWER: Generally, no. However, if at the time you are providing the information about a specific Government function a company with whom you want to seek employment or with whom you are currently seeking negotiating employment expresses interest to the Government about taking over this same function, you may not have a restriction. This would be unlikely. If it does happen, speak with your ethics counselor about obtaining a waiver under 18 U.S.C. section 208. This would allow you to seek and negotiate employment with the company and at the same time provide information to the agency about the Government function. Remember 18 U.S.C. section 208 is a law with criminal penalties so obtaining a waiver in these circumstances is essential.

MEO Q and A 2

QUESTION. Will this affect your ability to accept employment with/compensation from a particular company?

ANSWER. No. The only statute that restricts employment with a company is 41 U.S.C. 423. For this statute to apply, you have to perform certain tasks, such as being a member of the contract source selection board. Providing information to others who will develop an MEO is not one of those tasks. If you simply provide information to others who will develop the MEO, you should not be restricted in your activities under 41 U.S.C. 423.

MEO Q and A 3

QUESTION. Will this restrict your activities while working for a particular company?

ANSWER. Generally, no. However, if at the time you are providing information on a specific Government function, a company expresses interest to the Government about taking over the same function, you may have a restriction. If a company expresses the interest, you might not be allowed to "represent" that company or any other company back to government officials concerning the same matter, that is, the specific Government function. This would be unlikely.

If this restriction applies, you would not be stopped from accepting employment with the company. However, you could not represent the company in dealings and/or meetings with the Government concerning the same matter or Government function. Check with your ethics counselor before you provide the information about the function.

Preparing the MEO Analysis:

If you are an employee preparing the MEO analysis:

QUESTIONS: Will this affect your ability to search for post-government employment?

ANSWER: **Generally, no.** However, if at the time you are preparing the MEO analysis the company with whom you want to seek employment or with whom you are currently seeking or negotiating employment expresses an interest in receiving a contract for studied functions, you may face a restriction. This situation would be unlikely. Check with your ethics counselor prior to performing the MEO analysis.

Preparing the MEO Analysis: Q and A 2

QUESTION: Will this affect your ability to accept employment with compensation from a particular company?

ANSWER. **No.** The only statute that restricts employment with a company is 41 U.S.C. 423. For this statute to apply, you have to perform certain tasks, such as being a member of the contract source selection board. Developing an MEO is not a disqualifying task.

Preparing the MEO

Analysis:

Q and A 3

QUESTION: Will this restrict your activities while working for a particular company?

ANSWER. Generally, no. However, if at the time you are developing the MEO a company expresses interest in the studied function, you may have a restriction. You may not be allowed to "represent" this, or any other company, back to government officials on this same matter, to the specific Government function. This would be unusual. If this restriction applies, you would not be stopped from accepting employment with the contractor. However, you could not represent the contractor in dealings and meetings with the Government concerning the same matter or Government function. Check with your ethics counselor before you perform the MEO analysis.

PERFORMANCE WORK STATEMENTS ETC.

In addition to preparation of the MEO, management prepares a performance work statement (PWS). You may be asked to furnish data or technical support to be used by others developing performance statements of work or specifications.

If you are the employee furnishing data or technical support to be used by others:

PERFORMANCE WORK STATEMENTS

ETC. O and A 1

QUESTION: Will this affect your ability to search for post-government employment?

ANSWER: **Generally, no.** However, if at the time you are providing data or technical support on a specific Government function a company with whom you want to seek employment or with whom you are currently seeking or negotiating employment expresses interest to the Government about performing that function, you may face a restriction. This would be unlikely. If it does happen, consult with your ethics counselor about obtaining a waiver under 18 U.S.C. section 208. This would allow you to continue employment with the company and to provide data or technical support to agency officials about the Government function at the same time.

PERFORMANCE WORK STATEMENTS ETC. Q and A 2

QUESTION: Will this affect your ability to accept employment with compensation from a particular company?

ANSWER. **No.** The only statute that restricts employment with a company is 41 U.S.C. 423. For this statute to apply you have to perform certain tasks. Providing data or technical support to others is not one of those tasks.

PERFORMANCE WORK STATEMENTS ETC. Q and A 3

QUESTION: Will this restrict your activities while working for particular company?

ANSWER. **Generally, no.** However, if at the time you are providing data or technical support about a specific Government function, a contractor expresses interest to the Government about taking over the same function, you may have a restriction. You might not be allowed to "represent" that company, or any other company back to government officials concerning the same matter, that is, the particular Government function. This would be unlikely. It would not stop you from accepting employment with the contractor. The restriction would apply to your ability to "represent back" to the Government. You should consult with your ethics counselor before providing the data or technical support.

PERFORMANCE WORK STATEMENTS ETC. Q and A 4

If you are the employee developing the performance standards, statements of work, or specification:

QUESTION: Will this affect your ability to search for post-government employment?

ANSWER: **Possibly.** This could present a problem. If at the time you are developing the performance standards, statements of work, or specification for a specific Government function, the company or organization to whom you want to seek employment or with whom you are currently seeking or negotiating employment expresses interest to the Government about taking over this same function, you may have a conflict of interest restriction. This, however, would be unlikely. Any contact a company or organization makes with you concerning employment, even if you don't solicit it, must be reported to your supervisor. Check with your ethics officer before you work on the standards, statements of work, or specification.

PERFORMANCE WORK STATEMENTS ETC. Q and A 5

If you are the employee developing the performance standards, statements of work, or specification:

QUESTION: Will this affect your ability to accept employment with/compensation from a particular company?

ANSWER. **No.** The only statute that restricts employment with a company is 41 U.S.C. 423. For this statute to apply you have to perform certain tasks. Developing the performance standards, statements of work, or specification is not one of those tasks.

PERFORMANCE WORK STATEMENTS ETC. O and A 6

If you are the employee developing the performance standards, statements of work, or specification:

QUESTION: Will this restrict your activities while working for particular company?

ANSWER. Possibly. If at the time you are developing the performance standards, statements of work, or specifications regarding a Government function, a company expresses interest to the Government about taking over this same function, you may have a restriction that might not be allowed to "represent" this, or any other company, to government officials on the same matter, that is, the particular Government function. You would not be stopped from accepting employment with the contractor. The restriction would only affect your ability to "represent back" to the Government. Check with your ethics counselor before you work on the standards, statements of work, or specifications.

THE RIGHT OF FIRST REFUSAL

Solicitations for contractor proposals and contracts under an A-76 study contain a "Right of First Refusal" clause. The clause requires the contractor to give Government employees, adversely affected or separated as a result of the award of the contract, the right of first refusal for employment openings under the awarded contract. The Government employee must be qualified for the position. The clause is not a guarantee of a job offer.

THE RIGHT OF FIRST REFUSAL

QUESTION: If you are an employee whose position be affected, does the "Right of First Refusal" clause create a conflict of interest?

ANSWER. No. The right of first refusal only becomes effective after a contract is awarded, so the clause does not create a conflict. However, if you were to engage in discussions with a potential contractor while performing functions related to an A-76 study, such discussions could create conflicts - you should raise the question with your supervisor or Ethics Counselor before you have any discussions.

Seek includes sending a resume or, without your solicitation, a company contacting you about employment. Once you affirmatively reject an employment contact, you are not considered to be seeking employment. Negotiating includes, but is not limited to, interviewing for a job with a company.